APPENDIX A. Draft Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program

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State Water Resources Control Board

California Environmental Protection Agency

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POLICY FOR IMPLEMENTATION AND ENFORCEMENT OF THE NONPOINT SOURCE POLLUTION CONTROL PROGRAM

Guidance for Developing An Integrated Program for Implementing and Enforcing the "Plan for California's Nonpoint Source Pollution Control Program"

I. INTRODUCTION

In December 1999, the State Water Resources Control Board (SWRCB), in its continuing efforts to control nonpoint source (NPS) pollution in California, adopted the *Plan for California's Nonpoint Source Pollution Control Program* (NPS Program Plan) (SWRCB, 1999). The NPS Program Plan upgraded the State's first *Nonpoint Source Management Plan* adopted by the SWRCB in 1988 (1988 Plan) (SWRCB, 1988). Upgrading the 1988 Plan with the NPS Program Plan brought the State into compliance with the requirements of section 319 of the Clean Water Act (CWA) and section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). This document, the SWRCB *Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (NPS Implementation and Enforcement Policy), explains how the NPS Program Plan will be implemented and enforced and, in so doing, fulfills the requirements of California Water Code (CWC) section 13369 (a)(2)(B).

To continue receiving federal funds to implement the State's NPS pollution control program, the State was required to obtain approval of the NPS Program Plan from the U. S. Environmental Protection Agency (U.S. EPA) and the National Oceanic and Atmospheric Administration (NOAA). Federal approval required the SWRCB to provide assurances that it has the legal authority to implement and enforce the NPS Program Plan. In providing these assurances, the SWRCB cited the mandates and authorities granted it and the Regional Water Quality Control Boards (RWQCBs) by the Porter-Cologne Water Quality Control Act (Porter-Cologne Act). The Porter-Cologne Act designates the SWRCB and RWQCBs as the State agencies with primary responsibility for water quality control in California and obligates them to address all discharges of waste that could affect the quality of the waters of the State, including potential nonpoint sources of pollution. To carry out this mandate, the Porter-Cologne Act has provided the SWRCB and RWQCBs with:

- Planning authority to designate beneficial uses of the waters of the State, establish water quality objectives to protect those uses, and develop implementation programs to meet water quality objectives and maintain and/or restore designated beneficial uses;

- Administrative permitting authority in the form of waste discharge requirements (WDRs), waivers of WDRs, and basin plan prohibitions; and

- Enforcement options to ensure that dischargers comply with permitting requirements.

This NPS Implementation and Enforcement Policy explains how these Porter-Cologne Act mandates and authorities, delegated to the SWRCB and RWQCBs by the California Legislature, will be used to implement and enforce the NPS Program Plan. The policy also provides a bridge between the NPS Program Plan and the *SWRCB Water Quality Enforcement Policy* (Enforcement Policy) (SWRCB, 2002).

The information provided in this policy is designed to assist all responsible and/or interested parties in understanding how the State's NPS water quality control requirements will be implemented and enforced. The parties involved include the SWRCB and the RWQCBs, federal, state and local agencies, dischargers, designated third-party participants and any other interested public and private parties.

In addition to using the Porter-Cologne Act's planning, permitting, and enforcement authorities to prevent and control nonpoint sources of pollution, the SWRCB and RWQCBs have implemented a broad program of outreach, education, technical assistance and financial incentives. This program is supplemented by collaborative efforts with other agencies and non-governmental organizations (NGOs) to help implement and coordinate the use of their programs that contribute to NPS control. The goal is to provide an integrated statewide approach to controlling nonpoint sources of pollution. In structuring this document, a review of the Porter-Cologne Act is provided in Section II, including an overview of the Act related to planning requirements, and administrative permitting authorities; Section III provides history and background on development of the State's NPS pollution control program; Section IV discusses the structure of the NPS implementation program including statewide implementation, the five key elements of an NPS implementation program, and integration of the management options[1] into NPS pollution control; and Sections V and VI discuss RWQCB compliance assurance, implementation success, and future considerations.

II. STATUTORY AND REGULATORY BACKGROUND

A. Overview of the Porter–Cologne Water Quality Control Act

The Porter-Cologne Act is the principal law governing water quality control in California. It establishes a comprehensive program to protect water quality and the beneficial uses of waters of the State. The Porter-Cologne Act applies broadly to all State waters, including surface waters, wetlands, and ground water; it covers waste discharges to land as well as to surface and groundwater, and applies to both point and nonpoint sources of pollution.[2]

The Legislature has declared that it is the policy of the State that:

1. The quality of all the waters of the State shall be protected;
2. All activities and factors that could affect the quality of state waters shall be regulated to attain the highest water quality that is reasonable; and
3. The State must be prepared to exercise its full power and jurisdiction to protect the quality of water in the state from degradation.[3]

The Porter-Cologne Act is administered regionally, within a framework of statewide coordination and policy involving both the SWRCB and RWQCBs.[4] The SWRCB adopts State policy for water quality control and statewide water quality control plans, in addition to regulations that are binding on the RWQCBs. The RWQCBs each govern one of the nine hydrologic regions into which California is divided, adopting regional water quality control plans (basin plans) for their respective regions.[5] Basin plans are reviewed and updated on a triennial basis. The SWRCB must approve basin plans, or any amendments thereto, before they become effective.[6] Statewide plans adopted by the SWRCB supersede any RWQCB-adopted plans to the extent of any conflict. The RWQCBs also issue permits and waivers to implement basin plan water quality requirements and, when necessary, take enforcement actions.[7] The SWRCB adopts statewide general permits.[8] The SWRCB also reviews RWQCB decisions on petitions for review.[9] The primary point of contact for dischargers and other interested parties to receive information regarding the laws, regulations and programs related to NPS pollution control is at the regional level.

B. Porter-Cologne Act Water Quality Control Act Planning Requirements

Planning authority under the Porter-Cologne Act extends to any activity or factor which may affect water quality.[10] For example, factors which affect water quality include not only waste discharges, but also saline intrusion, reduction of waste assimilative capacity caused by reduction in water quantity, hydrogeologic modifications, watershed management projects, and land use.[11]

Water quality control plans designate beneficial uses of water, establish water quality objectives to protect those uses, and provide a program to implement the objectives.[12] The beneficial use designations and water quality objectives, together with the State's antidegradation policy,[13] constitute water quality standards for purposes of the CWA.[14] The water quality control plan implementation programs are required to describe the nature of actions that are necessary to meet water quality objectives, including recommendations for action by both private and public entities.[15] Implementation programs also must include a time schedule and describe proposed monitoring activities to assess compliance with water quality objectives.[16]

C. The Porter-Cologne Water Quality Control Act and Waste Discharge Regulation

The Porter-Cologne Act provides that "All discharges of waste into the waters of the state are privileges, not rights."[17] Furthermore, all dischargers are subject to regulation under the Porter-Cologne Act including both point and NPS dischargers.[18] In obligating the SWRCB and RWQCBs to address all discharges of waste that can affect water quality, including nonpoint sources, the legislature provided the SWRCB and RWQCBs with administrative permitting authority in the form of administrative tools (waste discharge requirements [WDRs], waivers of WDRs, and basin plan prohibitions) to address ongoing and proposed waste discharges.

The SWRCB and RWQCBs use their permitting authorities to implement the requirements of applicable State policies and state and regional water quality control plans. Permits take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of CWC section 13241.[19]

With the exception of persons discharging into community sewer systems, any person discharging or proposing to discharge waste that could affect water quality must file a report of waste discharge (RoWD) with the appropriate RWQCB, unless the RWQCB waives the filing.[20] A RoWD also is required if a discharger proposes a material change in the character, volume, or location of a discharge.[21] The RWQCB must then determine the appropriate action to take, either issuing WDRs to the discharger, or conditionally waiving the requirements.[22] Waste discharge requirements can prohibit the discharge of waste or certain types of waste, either under specific conditions or in specified areas. As an alternative, the RWQCB may prohibit the discharge of waste or certain types of waste in a water quality control plan.[23]

Because a RWQCB may choose to use the basin planning process to adopt some of these administrative approaches, there is some overlap between the planning and administrative processes. A categorical waiver of waste discharge requirements, for instance, could be adopted as a RWQCB basin plan amendment. The SWRCB and RWQCBs have broad discretion in how they use the administrative tools provided by the Porter-Cologne Act.

1. Waste Discharge Requirements

The RWQCBs have primary responsibility for issuing WDRs. The RWQCBs may issue individual WDRs to cover individual discharges or general WDRs to cover a category of discharges.[24] WDRs may include effluent limitations or other requirements that are designed to implement applicable water quality control plans, including designated beneficial uses and the water quality objectives established to protect those uses and prevent the creation of nuisance conditions. As in a basin plan prohibition, a WDR may specify certain conditions under which, or areas where, the discharge of waste or certain types of waste will not be permitted. Dischargers

operating under a WDR must submit an annual fee to the appropriate RWQCB to cover administrative costs. The fee schedule is determined by the SWRCB, based upon factors such as total flow, volume, number of animals or area involved, etc. These fees help provide the SWRCB and the RWQCBs with resources to administer the NPS program.

The SWRCB also can issue general WDRs under specific conditions.[25] Violations of WDRs may be addressed, for example, by issuing Cleanup and Abatement Orders (CAOs) or Cease and Desist Orders (CDOs), assessing administrative civil liability or seeking imposition of judicial civil liability or judicial injunctive relief.

2. Waivers of Waste Discharge Requirements

The requirements for a discharger to submit a RoWD or for a RWQCB to issue WDRs may be waived by the RWQCB or SWRCB for a specific discharge or a specific type of discharge if the state or regional board determines, after a public meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest.[26] All waivers are conditional and may be terminated at any time. Except for waivers for discharges that the SWRCB or a RWQCB determines do not pose a significant threat to water quality, waiver conditions must include, but need not be limited to, individual, group or watershed-based monitoring.[27] Waivers may not exceed five years in duration, but may be renewed. Prior to renewing a waiver, the SWRCB or RWQCB must determine whether the discharge in question should be subject to general or individual WDRs.

CWC section 13269(e) provides that "the regional boards and the state board shall require compliance with the conditions pursuant to which waivers are granted...." Therefore, even where the RWQCBs decide to waive the requirement to submit a RoWD for general WDRs, the RWQCBs are encouraged to have an enrollment process for coverage under the waiver of WDRs so that the RWQCBs can identify the dischargers who are required to comply with the general waiver of WDRs. Although the RWQCBs retain their prosecutorial discretion to decide how to ensure compliance with their conditional waivers, the language of section 13269(e), makes it clear that the legislature intends that the RWQCBs allocate some of their resources to ensuring that dischargers are in compliance. As of January 1, 2004, RWQCBs are authorized to collect annual administrative fees to establish and implement waivers of WDRs.[28]

There are many different ways for the RWQCBs to ensure compliance. In the event of noncompliance, the RWQCB could rescind the waiver, or terminate its applicability to individual dischargers, and issue WDRs in its place. If the waiver leaves significant discretion with the discharger to determine how to comply with the waiver's conditions, the RWQCB could adopt a new waiver that is more directive in terms of the actions that the dischargers must take in order to comply with the waiver. In order to be enforceable, waiver conditions should be clearly specified.

Potential enforcement actions include issuance of a notice of violation (NOV), an informal enforcement action which notifies the discharger of the violation of the waiver condition and the reasonably expeditious time within which compliance must be achieved to avoid proposed adoption of WDRs. Other formal enforcement actions that may be taken include CAOs, CDOs, notices to comply (NTC), and time schedule orders.

3. Prohibitions

Pursuant to CWC section 13243, RWQCBs may prohibit discharges of waste or types of waste either through WDRs or through waste discharge prohibitions specified in a basin plan. A RWQCB may amend a basin plan to prohibit a particular discharge or a particular type of discharge or to conditionally prohibit a discharge. A conditional prohibition may include specific conditions under which application or enforcement of the prohibition for a particular discharge or particular type of discharge may be waived. In some cases, RWQCBs may waive application of the prohibition for the planning and permitting period of projects or activities. RWQCBs may also use conditional basin plan prohibitions as the primary administrative tool for implementation programs - for example, in cases where a RWQCB desires to prohibit discharges unless certain procedural or substantive conditions are met. Basin plan prohibitions are extremely useful because, once adopted, they allow a RWQCB to take direct and immediate enforcement action by issuing CAOs or CDOs, or assessing civil liabilities, even in the absence of WDRs. Therefore, they allow RWQCBs to respond in a timely manner where NPS pollution generated by certain activities is creating an emergency or a problem that is not otherwise being remedied in an adequate or timely manner.

D. Porter-Cologne Act Enforcement Options

Just as the RWQCBs are obligated to address all NPS discharges of waste through one or more of the available administrative tools, they also are obligated to take steps to ensure that their NPS pollution control requirements are met. The SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. These options range from informal NOVs to formal actions defined in the Porter Cologne Act. Formal actions range from NTCs to civil administrative remedies, and can include referrals for criminal penalties. Both the Enforcement Policy and common RWQCB practice recognize the merit of progressive enforcement---that is, initially taking whatever level of enforcement is appropriate, considering the RWQCB workload and the circumstances of the case, and applying increasingly severe remedies where necessary to correct a problem.

III. DEVELOPING THE STATE'S NPS POLLUTION CONTROL PROGRAM

The State's NPS Program has been developed in conformance with the CWA, CZARA, and the Porter-Cologne Act. The CWA requires the SWRCB to develop and implement an NPS pollution control program and provides funding for this purpose. The NPS Program Plan was the State's response to this requirement, as well as to additional federal requirements for the inclusion of management measures (MMs) consistent with the CZARA *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution to Coastal Waters* (USEPA, 1993). As described above, the Porter-Cologne Act provides the SWRCB and RWQCBs with the authority and administrative tools to implement the CWA and CZARA requirements.

The Porter-Cologne Act also provides the definition of "waste" that is integral to understanding the SWRCB's and RWQCBs' NPS pollution control authorities and responsibilities. "Waste" is broadly defined to include sewage and "any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation".[29] This definition includes all Attorney General interpretations of the terms "sewage", "industrial waste", and "other wastes" under the Porter-Cologne Act's predecessor legislation.[30] The Attorney General has interpreted the latter terms to include wastes from a wide variety of activities. As a result, it is clear that "discharges of waste" are not limited to discharges resulting from waste disposal activities, but also include releases of pollutants as part of other activities, including all nonpoint sources of waste.[31]

In the Porter Cologne Act, the term "discharge of waste" includes all discharges, point and nonpoint, including agricultural return flows and storm water discharges. The CWA distinguishes between point and nonpoint sources of pollution. Under the CWA, a point source is identified as a discernible, confined, and discrete conveyance, such as a pipe, ditch, or channel; however, irrigated agricultural return flows and agricultural storm water runoof are excluded. Nonpoint pollution sources generally are sources of water pollution that do not meet the definition of a point source as defined by the CWA. NPS pollution typically results from contact between pollutants and land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification. Consequently, the most successful control of nonpoint sources is achieved by prevention or by minimizing the generation of NPS discharges.

Regulation of nonpoint sources of pollution is much less prescriptive than point sources and most NPS management programs typically depend, at least in part, upon discharger implementation of management practices (MPs) to control nonpoint sources of pollution. As originally used in the CWA and its implementing regulations, the term "BMP" officially referred only to practices that had been formally adopted by the SWRCB through its continuing planning program. Informally, however, prior to adoption of the NPS Program Plan, the term became generally used to refer to any type of practice for NPS control, whether formally approved or not. In this policy, the term "MP" has replaced the formerly

used term "BMP" when referencing practices that have not been formally adopted by the SWRCB.

MPs may include, but are not limited to, structural and non-structural (operational) controls. They may be applied before, during and after pollution producing activities to eliminate or reduce the generation of NPS discharges and the introduction of pollutants into receiving waters. Successful MP implementation typically requires: (1) adaptation to site-specific or regional-specific conditions; (2) monitoring to assure that practices are properly applied and are effective in attaining and maintaining water quality standards; (3) immediate mitigation of a problem where the practices are not effective; and (4) improvement of MP implementation or implementation of additional MPs when needed to resolve a deficiency. MP implementation, however, may not be substituted for actual compliance with water quality requirements. The U.S. Court of Appeals for the Ninth Circuit, in *Northwest Indian Cemetery Protective Ass'n v. Peterson*, held that BMPs [MPs] in a certified water quality management plan were not "...standards in and of themselves. Adherence to the BMPs [MPs] does not automatically assure compliance ...the federal statute [CWA] contemplates that any activity conducted pursuant to a BMP [MP] can be terminated or modified if the conducted activity resulted in a violation of water quality standards."[32]

There are many programs provided by state and federal agencies, as well as NGOs, to assist dischargers. These programs can help dischargers understand how their operations can cause NPS pollution and help them choose and implement MPs to prevent or control NPS pollution. In addition, many of the programs provide financial as well as technical assistance.

Since the early 1990s, using CWA § 319(h) funds, the SWRCB and RWQCBs have reached out to dischargers with technical and educational information and financial support to assist with MP implementation. Other informal RWQCB programs have encouraged development of watershed groups to facilitate NPS pollution control efforts. Additional technical expertise and/or financial assistance are provided through the grant and loan sources of other state and federal agencies. These include resource conservation districts (RCDs), University of California Cooperative Extension and the Natural Resources Conservation Service. In addition, there are State agencies, other than the SWRCB and RWQCBs, with programs and authorities related to NPS control, that help implement the NPS Program Plan by coordinating their programs and activities. Under the leadership of the SWRCB and the California Coastal Commission (CCC), an Interagency Coordinating Committee (IACC) meets regularly to actively promote and coordinate inter-agency NPS pollution control activities.[33]

IV. STRUCTURING THIRD-PARTY NPS IMPLEMENTATION PROGRAMS

A. Definition of a Third-Party NPS Implementation Program

For the purposes of this policy, a Third-Party NPS implementation program is a program developed by one or more third parties to comply with WDRs, a waiver of WDRs, or a basin plan prohibition governing NPS pollution. In this policy, these programs are referred to as Third-Party Programs. Third-Party Programs are programs that neither the SWRCB nor a RWQCB has developed.

B. Statewide Implementation and the Use of Third-Party Programs

The RWQCBs are the agencies with primary responsibility for ensuring that there are appropriate NPS control implementation programs in place to meet water quality objectives and to protect the beneficial uses of the waters of the State.[34] To fulfill these responsibilities, the RWQCBs may approve or endorse Third-Party Programs in many ways. These include, but are not limited to, adopting a program that includes issuing WDRs or a waiver of WDRs for a category of NPS dischargers, or adopting a basin plan amendment that addresses NPS discharges throughout the region.

There are many potential organizational approaches to developing an appropriate Third-Party Program. Given the extent and nature of NPS pollution of the State's waters, the RWQCBs need to be as creative and efficient as possible if California's water quality protection and restoration goals are to be achieved. A Third-Party Program may be developed by or for an individual discharger or through a collective effort for a group of dischargers. Groups of dischargers may differentiate themselves in many ways: regionally, sub-regionally, by watershed, discharge characteristics, discharger community type, or through participation in some other publicly or privately developed program. Though dischargers participate in Third-Party Programs, organizationally, they may be managed by someone other than the dischargers. There are organizations or entities already involved in NPS management programs, for instance, RCDs, watershed groups, and some industry groups such as the dairy industry. A RWQCB may use whatever mix of organizational approaches it deems appropriate, as long as it can provide a rational explanation for why it is treating some dischargers differently than other dischargers (e.g., because one group of dischargers is actively participating in a watershed group's efforts, while another is not).

C. Third-Party Programs Administered by State Agencies Other Than the SWRCB Or RWQCBs

There are agencies, in addition to the SWRCB and RWQCBs, with the authority to implement programs to meet water quality objectives and protect beneficial uses. Several of

these agencies are formally linked to the RWQCBs and SWRCB through memoranda of understanding (MOUs) or management agency agreements (MAAs). MOUs and MAAs are important for NPS regulation because they delineate the roles and responsibilities of individual agencies with respect to controlling NPS pollution. In all cases, agencies with regulatory power act in accordance with their own authorities and processes.

There are two general types of MOUs: (1) cooperative agreements made with other agencies or organizations that are able to provide information or technical or financial assistance to further the State's goal of preventing or controlling nonpoint sources of pollution; and (2) cooperative agreements made with land management agencies with authority to control NPS discharges through inclusion of MPs in their land lease agreements.

With an MAA, the SWRCB may designate another agency as a management agency to take the lead in implementing NPS pollution control. The actions taken by these agencies are taken under their own authorities and using their own regulatory processes. The fundamental purpose of the SWRCB/RWQCBs when applying the management agency approach is to achieve, through the capabilities of a management agency, at least the same degree of control over NPS pollution as could be attained through direct regulation under SWRCB/RWQCB authority, but to do so more efficiently.

The SWRCB and RWQCBs may not delegate their NPS authorities and responsibilities to another agency, and may not indefinitely defer taking necessary action if another agency is not properly addressing a NPS problem. However, where another agency is constructively involved in NPS efforts, the SWRCB and RWQCB should seek to take those efforts into account and, where appropriate, take advantage of these third-party efforts. Not only does this avoid unnecessary duplication of effort, it can leverage the SWRCB's and RWQCBs' limited staffing and financial resources. While another agency's actions pursuant to an MOU or MAA do not fulfill the RWQCBs' obligation to use its administrative tools to address the relevant NPS discharges, another agency's actions can serve, for example, as the basis, in part or in whole, for a RWQCB waiver of WDRs for the activities covered in these agreements.

If water quality problems persist, the RWQCBs may not indefinitely defer enforcement action to other agencies. While the RWQCBs cannot directly enforce another agency's requirements against a discharger who is out of compliance, the RWQCB can ask the agency to enforce its own requirements. In addition, a RWQCB can enforce the conditions or requirements contained in the waiver, WDR, or prohibition that addresses the underlying discharge of waste. Consistent with a particular MAA, the lead agency under an MAA may be given an opportunity to achieve compliance before the RWQCBs take necessary action.

In addition to the agencies with which MAAs and MOUs have been executed, there are situations where other agencies or organizations are involved in NPS pollution control efforts with and without a formal agreement with the SWRCB or a RWQCB. Several RWQCBs have had experience working with industry groups, both formally and informally, to develop

education and self-regulation within a particular industry. Other organizations have become active in NPS pollution prevention and land restoration efforts through CWA §319(h) grants, State bond grants, or the State Revolving Fund loan program. Many of the partnerships formed to take advantage of these financial resources have developed into self-sustaining third-party organizations. Some are affiliated with RCDs or have developed as part of the Coordinated Resource Management Planning (CRMP) approach; others are watershed groups or have developed their own organizational structure based on other geographic or industry-specific factors. In some situations the organizations accomplish their goals through a mix of public and private partnership efforts. The RWQCB staff has worked with these groups at various levels.

The RWQCBs also have developed partnerships with other agencies that are in a position to take quick and decisive enforcement action. The California Department of Fish and Game, for instance, may take action against a problem discharger under its own laws and regulations, working with either the local county district attorney's office or the attorney general's office.

The RWQCBs have broad flexibility and discretion in fashioning NPS management programs, and are encouraged to be as innovative and creative as possible, and, as appropriate, to build upon Third-Party Programs. The State Board, in turn, is encouraged to establish a program that recognizes and honors successful and outstanding third-party efforts.

D. The Key Elements of an NPS Pollution Control Implementation Program

Before approving or endorsing a specific Third-Party Program, the RWQCB must determine that there is a reasonable likelihood that the Third-Party Program will attain the RWQCB's stated objectives. This will include consideration of the MPs to be used and the process for ensuring their proper implementation. It also will include other factors such as the level of discharger participation and the effectiveness of the MPs implemented. NPS dischargers have and will receive many opportunities to take advantage of the available technical and financial assistance programs administered through the SWRCB, as well as assistance offered by other programs. A first step in the education process offered by these programs often consists of discharger assessment of their lands or operations to determine NPS problems, followed by the development of a plan to correct those problems. It is important to remember that the development of a plan is only the first step in addressing the discharger's NPS problems. Implementation of the plan, including any necessary iterative steps to adjust and improve the plan and/or implementation must follow the planning stage.

Prior to recognizing a Third-Party Program as sufficient to meet their obligations to protect water quality, RWQCBs shall ensure that the program meets the requirements of the five key structural elements described below. While the RWQCBs are free to use the administrative tool(s) that they determine to be most appropriate for a particular Third-Party Program, all programs will have the five structural elements in common. Development of Elements 1 and

2 are the primary responsibility of the Third-Party. Elements 3 and 4 may require Third-Party consultation with a RWQCB. Element 5 shall be developed by the RWQCB. Ultimately, a Third-Party Program's adherence to a structure based on the five key elements also may serve other purposes, including determining whether NPS control projects qualify for grant funding.

For Third-Party Programs that primarily are non-regulatory, factors such as availability of funding, a demonstrated track record or commitment to NPS control implementation, and a level of organization and group cohesion that facilitates NPS implementation is among the critical factors that must be taken into account. For primarily regulatory programs, the availability of RWQCB staff resources to administer the implementation may be a major concern.

Third-Party Programs shall include the following five key elements:

KEY ELEMENT 1: A Third-Party Program's ultimate purpose shall be explicitly stated. Third-Party Programs must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

Existing and potential beneficial uses of the waters of the State are identified through a public process. RWQCBs establish water quality objectives to protect those uses, and a program to implement the objectives. The State also is required to adopt and implement an antidegradation policy designed to protect water quality that is higher than that necessary to protect the designated beneficial uses. For purposes of this policy, the term "water quality requirements" will be used to include water quality objectives established to protect beneficial uses and any higher level of water quality needed to comply with the State's antidegradation policy.

A Third-Party Program must be specific as to the water quality requirements it is designed to meet. For example, if the program relies upon dischargers' use of MPs, there should be a strong correlation between the specific MPs implemented and the water quality requirements in question. The program also should identify which dischargers are expected to participate, so that the RWQCB can ensure that all of the significant sources of the NPS discharges of concern are addressed.

KEY ELEMENT 2: The Third-Party Program shall include a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program's stated purpose, the process to be used to select or develop MPs, and the process to be used to ensure and verify proper MP implementation.

The RWQCB must determine that there is a reasonable likelihood that the program will attain water quality requirements. This will include consideration of the MPs to be used

and the process for ensuring their proper implementation. It also will include other factors such as the level of discharger participation and the effectiveness of the MPs implemented.

KEY ELEMENT 3: Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the Third-Party Program shall include a specific time schedule and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.

The Porter-Cologne Act (CWC §13242[b] and § 13263[c]), the NPS Program Plan, and the NPS Implementation and Enforcement Policy recognize that there are instances where it will take time to achieve water quality requirements. The effort may involve all or some of various processes, including: identification of a responsible third-party to lead the effort and identification of parties responsible for MP implementation; identification of measurable long term and interim water quality goals and a timeline for achieving these goals; identification and implementation of pollution control MPs, as well as provision for maintenance of the implementation actions and provision for additional actions if initial actions are inadequate.

In considering approval of specific interim goals and the time necessary to achieve those goals, a RWQCB may consider such factors as the necessity of providing for significant capital outlays for MP implementation, the presence of a severely degraded waterbody, and whether or not a Third-Party Program is a component of a larger TMDL implementation program. The time schedule may not be longer than that which is reasonably necessary to achieve the Third-Party Program's objectives. Preliminary development of the time schedule shall be undertaken by the Third-Party. The RWQCB may amend and must approve the time schedule. If the RWQCB later determines that additional time is necessary to complete the program, it may make further amendments to the time schedule or issue an enforcement order that contains a compliance schedule.

KEY ELEMENT 4: The Third Party Program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.

Verification measures to determine whether a Third –Party Program is meeting its stated purpose is a key element of all NPS control implementation programs. If the Third Party Program depends upon an iterative MP approach, in addition to verification of proper MP implementation (Key Element 2), feedback mechanisms are needed to clearly indicate whether and when additional or different MPs or MP implementation measures must be used, or other actions taken. Designing the appropriate types and frequency of verification and feedback measures (e.g. reporting, inspection, monitoring, etc.) is an integral part of implementation Third-Party Program development and success.

In all cases the Third-Party Program should describe the measures, protocols, and associated frequencies that will be used to verify the degree to which the MPs are being properly implemented and are achieving the program's objectives and/or to provide feedback for use in adaptive management. These efforts are necessary to determine whether the program is on time and on track in achieving its goals.

Depending on the water quality problem, the cause, the beneficial uses at risk, and the purpose for which the monitoring will be used (e.g. adaptive management or regulatory purposes) the appropriate type(s) of monitoring should be used. Some monitoring approaches include photo monitoring; assessing residual dry matter on rangelands; various indicators of healthy instream habitat; riparian and wetland habitat structure, density and cover; and bioassessment. Some programs may involve collecting and reporting ambient water quality monitoring data. Those programs should be consistent with the SWRCB Surface Water Ambient Monitoring Program (SWAMP) Data Quality Management Plan (DQM), which provides for more than one level of data quality. The DQM approach to data quality recognizes that the rigor needed to monitor for regulatory purposes may not be necessary for other purposes. Consequently, the SWAMP DQM provides date quality and reporting objectives for both regulatory and screening studies. Regardless of which approach is used, all monitoring programs should be reproducible, provide a permanent/documented record and be available to the public.

KEY ELEMENT 5: Each RWQCB shall make clear, in advance, the potential consequences for failure to achieve a Third-Party Program's stated purposes.

A RWQCB action to approve or endorse a Third-Party Program shall contain a general description of the course of action or actions to be taken if verification/feedback mechanisms indicate or demonstrate that the program is failing to achieve its stated objectives. Depending on the particular program, some of the courses of action may be initiated by the RWQCB, a third-party agency or private entity, or both. Although not binding on the RWQCB, this element should be written with the objective of creating clear expectations and reinforcing the obligations that dischargers, third parties, and other agencies, in addition to the RWQCBs, have accepted in agreeing to implement the Third-Party Program. This element also has the advantage of requiring the examination of proposed programs with respect to options for enforcement should the program not proceed as well as expected.

Clear expectations regarding potential RWQCB responses to inadequate or ineffective programs, including but not limited to adopting a revised program or the taking of an enforcement action, provides dischargers and the public with greater certainty regarding the process. RWQCB options will vary significantly, depending on the structure of the program (e.g., which administrative tool or tools are being utilized, whether third-party regulatory or land use agencies or private entities are coordinating the dischargers' efforts, etc.) While not all programs need be directly enforceable, any enforcement limitations

that might be encountered should be well understood by the RWQCB prior to approving or endorsing an Third-Party Program.

In cases of individual noncompliance, selective enforcement actions may be taken. In cases of third-party noncompliance, an effort to revise the Third-Party Program is an alternative. Generally, prior to initiating major revisions to a program, informal contact with dischargers, group representatives, or other third parties, if any, will be attempted in order to redirect unsuccessful efforts. However, although the direction and efforts of a particular Third-Party Program are being undertaken as a group effort, with group designated or accepted leadership, if the group or third-party fails to follow through on their commitments, any RWQCB enforcement action taken will be against individual dischargers, not the third-party.

E. Integrating CWC §13369 Management Options Into NPS Pollution Control

California's first, statewide formal strategy for controlling NPS pollution was established in 1988 when the SWRCB adopted California's first nonpoint source management plan. The 1988 Plan provided a broad outline of management options described as "general management approaches" considered useful in addressing NPS problems. The management options later were included in the NPS Program Plan and subsequently described in CWC §13369(a)(2)(A), as: (1) Non-regulatory implementation of management practices, (2) Regulatory-based incentives for management practices, and (3) The adoption and enforcement of waste discharge requirements that will require the implementation of management practices.

Although the terms used to express the management options have changed slightly over time, the underlying definitions have remained fairly consistent. The management option concept was never an attempt to establish rigid boundaries around NPS control actions, but was an attempt to recognize and acknowledge the many differing attitudes and potential responses to the State's efforts to control NPS pollution.

A RWQCB's approach regarding a NPS source discharge may have components of more than one management option, and the management options do not provide an exhaustive list of all of the ways to control NPS pollution. As described in the 1988 Plan, for example, WDRs could impose effluent limitations rather than, or in addition to, an obligation to conduct specified MPs. In addition, although there is not a direct correlation between the three administrative tools, which are available to the RWQCBs (see Section IIC above) and the three management options, dischargers are always under one of the administrative tools. For example, depending upon the specific contents of a particular administrative tool, waivers of WDRs could be characterized as Option 1 and/or Option 2, while some WDRs and conditional prohibitions could be characterized as Option 2 and/or Option 3. Consequently, the three management options provide only a general outline for categorizing many RWQCB

NPS pollution control efforts. The actual contents of the administrative tool that implements a particular NPS implementation program are of greater import than the management option used to characterize the administrative tool. Additional information about "management options" is provided below.

Management Option 1: Non-Regulatory Implementation of MPs

The "non-regulatory implementation" option is characterized primarily by implementation actions or programs where a RWQCB does not directly impose obligations on dischargers to implement NPS control MPs. These actions or programs may rely upon discharger NPS pollution control actions implemented under the administration of Third-Party Programs, as described above, if those programs incorporate the five key elements as outlined above. Where existing Third-Party Programs do not contain all five of the elements, the parties responsible for managing these programs should generally be asked by the RWQCBs to voluntarily supplement their programs with additional measures designed to meet the five elements. If they do so, the entire program could be considered as "non-regulatory implementation". Where a third party does not choose to include these elements as part of its program, the RWQCBs will need to establish the supplemental elements. Another example of "non-regulatory implementation" is where dischargers determine that it is feasible to completely prevent all discharges of waste. If a RWQCB determines there is no remaining threat of discharges that could affect the quality of waters of the State, it loses jurisdiction to impose an obligation to conduct MPs.[35]

Management Option 2: Regulatory- Based Incentives for MPs

The "regulatory-based incentives" option includes those programs where the RWQCBs provide incentives to dischargers to implement specific MPs, but do not explicitly mandate their use. Relief from substantive or procedural requirements, such as reduced frequency of monitoring or reporting or elimination of a requirement to obtain RWQCB approval or licensed professional certification of discharger-specific NPS pollution management plans, if otherwise required, are among the types of incentives that are available to a RWQCB.

Management Option 3. Waste Discharge Requirements that Require MP Implementation

This management option is characterized as direct regulation and is more prescriptive than "non-regulatory implementation" and "regulatory-based incentives," in that the RWQCBs may use WDRs to mandate the use of specific MPs as further described below. The Porter-Cologne Act states that a RWQCB may not "specify the design, location or type of construction" required to achieve compliance with water quality standards. However, RWQCBs may prescribe the use of a specific MP as long as the RWQCBs also explicitly

allow a discharger to substitute another MP of their own choosing that will achieve the same level of water quality protection. This provides dischargers with flexibility and managerial control over their operations. In addition to MPs, WDRs may also include effluent limitations, receiving water limitations, monitoring and reporting provisions, and other requirements.

V. RWQCB Compliance Assurance

Typically, the RWQCBs have regulated individual dischargers, rather than groups of dischargers who are represented or coordinated by third parties. Individual dischargers, including both landowners and operators, continue to bear ultimate responsibility for complying with a RWQCB's water quality requirements and orders. Generally, under the Porter-Cologne Act, the RWQCBs cannot take enforcement actions directly against non-discharger third parties. As part of the fifth element described above, the RWQCBs will need to explain how significant non-compliance can be addressed in Third-Party Programs. This explanation should include information as to the criteria for measuring program success, what constitutes failure, and the actions that may be taken in response to failure. Individual dischargers need to be informed as to what individual discharger actions or inactions will lead to individual enforcement. This explanation is necessary so that participating dischargers understand the ramifications of non-compliance, even if that non-compliance is by a third party they have selected as their representative. Options short of individual enforcement actions could include RWQCB actions such as changing a program to remove some autonomy, or developing sequential enforcement phases related to triggering events built into the program. Ultimately, the ineffectiveness of a group through which a discharger participates in NPS control efforts cannot be used as an excuse for lack of individual discharger compliance.

The SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. Both the Enforcement Policy and common RWQCB practice also recognize the merit of progressive enforcement. With progressive enforcement, a RWQCB implements enforcement through an "...escalating series of actions that allows for the efficient and effective use of enforcement resources to: (1) assist cooperative dischargers in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance."

VI. IMPLEMENTATION SUCCESS AND FUTURE CONSIDERATIONS

This policy provides a template for NPS pollution control in California. However, the ability of the SWRCB and RWQCB to aggressively implement and enforce the State's NPS Program in a reasonable timeframe is directly linked to the resources available—both staff and budget—to carry out the program. The SWRCB recognizes that it needs to provide strong

support for the RWQCBs' efforts through available technical and financial oversight and assistance. Statewide, a diverse array of parties participate in various ways to implement NPS pollution control measures. However, in most situations, the primary participants are the RWQCBs and NPS dischargers. The RWQCBs are expected to develop their own priorities and schedules for addressing the specific types of NPS pollution present within their regions.

Successful implementation of the NPS Program largely depends on two factors: the ability of the RWQCBs to use their administrative authorities and limited resources in creative and efficient ways, and the willingness of dischargers to implement MPs and other strategies that effectively prevent or control NPS discharges. To help accomplish this goal, dischargers are urged to take advantage of the many technical and financial assistance programs available to assist them and described earlier in this document.

Current land use management practices that have resulted in NPS pollution have a long and complicated physical, economic and political history. In addition to the need for resources, forging a new history of pollution control will take time and commitment, as well as a willingness to examine old habits and cultural barriers. Therefore, it is expected that it will take a significant amount of time for the RWQCBs to approve or endorse NPS Third-Party Programs throughout their regions, and even longer for those programs to achieve their objectives.

A rigorous dedication to periodic evaluation of all aspects of the program and an adaptive management approach will facilitate the road to success. Statewide implementation of the NPS program is predicated not only on individual NPS discharger actions to adopt and adapt alternative MPs, but upon the development and adaptation of self-determined management structures that encourage and support these changes. Much is known about the MPs that most effectively prevent and control polluted runoff. Less is understood about the alternative alliances and management structures - the Third-Party Programs - that most efficiently and effectively will result in the watershed or industry-wide actions needed to control NPS pollution statewide. In addition to the public and private financial resources dedicated to this purpose, this effort will require a conscious willingness to experiment, evaluate and adapt management approaches that will support and bring us closer to our ultimate goal of controlling NPS pollution to protect the quality of waters of the State in accordance with the mandates of the Porter-Cologne Act.

REFERENCES

SWRCB, 1988. Nonpoint Source Management Plan. State Water Resources Control Board, Division of Water Quality, Sacramento, CA. November 1988.

SWRCB, 1999. Plan for California's Nonpoint Source Pollution Control Program. Division of Water Quality, Sacramento, CA. December 1999.

SWRCB, 2002. Water Quality Enforcement Policy. Office of Statewide Initiatives, Sacramento, CA. February 2002.

USEPA, 1993. Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters. January 1993.

END NOTES

1. California Water Code (CWC) 13369

2. CWC 13050[e],13260[a],13263[a],13376,13377. See also Lake Madrone Water District v. State Water Resources Control Board (1989) 209 Cal.App.3d 163, 171-175, 256 Cal.Rptr. 894 (Lake Madrone); Tahoe-Sierra Preservation Council v. State Water Resources Control Board (1989) 210 Cal.App.3d 1421, 1435, 259 Cal.Rptr. 132; 63 Ops.Cal.Atty.Gen. 51, 53-359 (1980) (Tahoe-Sierra).

3. See Water Code section 13000

4. See Water Code section 13000

5. (CWC sections 13200, 13201)

6. (CWC section 13245)

7. (CWC sections 13168, 186)

8. (CWC sections 13263(i), 13377; 40 Code of Federal Regulations [CFR] section 122.28; Cal. Code of Regulations [CCR] Title 23, section 2235.2)

9. (CWC section 13320; CCR, Title 23, sections 2050-2068)

10. (CWC sections 13000, 13050(i), 13140, 13142, 13241)

11. See discussion in Chief Counsel's Statement for the State Nonpoint Source Management Program Administered by the State Water Board and the Regional Water Boards (October 1988), pp. C-1 through C-2. See also Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program, pp. 3-4 (1969).

12. (CWC section 13050[j])

13: The federal antidegradation policy is contained in 40 C.F.R. sec. 131.12. The state is required to adopt and implement an antidegradation policy consistent with the federal policy. The federal policy establishes three tiers of water quality protection. The first tier establishes a minimum requirement that existing instream uses and the level of water quality necessary to protect those uses be maintained and protected. The second tier is designed to protect high quality waters by establishing prerequisites for allowing degradation of these waters. The third tier addresses outstanding national resource waters.

14. (See 33 U.S.C. sec. 1313(c); 40 CFR sections 131.3[i], 131.6)

15. (CWC section 13242)

16. (CWC section 13242)

17. CWC section 13263[g]

18. CWC section 13260

19. CWC section 13263[a]

20. (CWC sections 13260, 13269)

21. (CWC section 13264)

22. (CWC sections 13263, 13269)

23. (CWC section 13243)

24. (CWC section 13263[a] and [i]

25. (CWC section 13263[i])

26. CWC section 13269(a)(1)

27. CWC section 13269 (a)(2)

28. CWC section 13269(a)(4)(A)

29. (CWC section 13050[d])

30. Lake Madrone, supra, fn. 1, 209 Cal.App. 3d at 169, 256 Cal.Rptr. 894; see Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program (1969) (Final Report), App. A, p. 23.

31. See e.g., Lake Madrone, supra, fn. 1 (release of accumulated sediment from a dam held a discharge of waste). See also discussion in Sawyer, State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow (1988) Pacific L.J. 1267, 1273-1275.

32. Northwest Indian Cemetery Protective Association vs. Peterson, (Ninth Circuit 1986) 795 F.2d688, 697, revised on other grounds (1988) Lung vs. Northwest Indian Cemetery Protective Association 485 U.S. 439 [108 S.Ct. 1319.99 L.Ed.2d.

33. Statewide information about IACC agencies and their activities is currently available at http://www.swrcb.ca.gov/nps/iacc.html.

34. CWC section 13001

35. CWC section 13260